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No. 93-1544

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Petitioner,

v.

ROY T. HUGHES,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The respondent believes the questions presented by the petitioner do not accurately represent the facts in this case, nor the conclusions reached by the Nebraska State Supreme Court. Accordingly, should this Court grant the Petition for Writ of Certiorari, the respondent believes the case would pose the following questions:

I. CAN A STATEMENT GIVEN BY A WITNESS TO POLICE, UNDER CIRCUMSTANCES WHICH WERE SO COERCIVE AS TO RENDER THE STATEMENT VIRTUALLY INVOLUNTARY, BE ADMITTED INTO EVIDENCE AGAINST A CRIMINAL DEFENDANT WHEN THE DECLARANT IS DEEMED TO BE AN UNAVAILABLE WITNESS WITHOUT THE ADMISSION OF SAID STATEMENT CONSTITUTING A VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE?

II. CAN A STATEMENT GIVEN BY A WITNESS TO POLICE, UNDER CIRCUMSTANCES WHICH WERE SO COERCIVE AS TO RENDER THE STATEMENT VIRTUALLY INVOLUNTARY, BE ADMITTED INTO EVIDENCE AGAINST A CRIMINAL DEFENDANT WHEN THE DECLARANT IS DEEMED TO BE AN UNAVAILABLE WITNESS UNDER CIRCUMSTANCES WHERE THERE IS NO INTERNAL INDICIA OF RELIABILITY, BUT WHERE THE STATEMENT IN QUESTION IS IN SOME PARTS CORROBORATED, BUT IN OTHER PARTS DIRECTLY REFUTED?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES CITED iii

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. THE DECISION OF THE NEBRASKA SUPREME COURT, REGARDLESS OF THE UNITED STATES CONSTITUTIONAL IMPLICATIONS, WAS ALSO DECIDED ON ADEQUATE INDEPENDENT STATE GROUNDS 5

II. THE DECISION OF THE NEBRASKA STATE SUPREME COURT IS BASED UPON THE FACTS OF THAT PARTICULAR CASE, AND THESE FACTS ARE SUCH THAT THE CASE DOES NOT PRESENT ITSELF AS AN APPROPRIATE VEHICLE TO REACH THE QUESTIONS WHICH PETITIONER CLAIMS ARE IMPLICATED HEREIN 6

CONCLUSION 10

TABLE OF AUTHORITIES CITED

Page

CASES:

Chambers v. Mississippi, 410 U.S. 284 (1973) 9

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

Lee v. Illinois, 476 U.S. 530 (1986) 9

Michigan v. Long, 463 U.S. 1032 (1983) 6

Ohio v. Roberts, 448 U.S. 56 (1980) 9

State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986) 9

State v. Wiley, 223 Neb. 835 (1986) 8

United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1981) 9

White v. Illinois, ___ U.S. ___, 112 S.Ct. 736 (1962) 9

Williamson v. United States, Case No. 93-5256 7

OTHER AUTHORITY:

Nebraska State Constitution, Article I, Section 11 5

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provisions and the Nebraska Revised Statutes sections identified in the Petition for Writ of Certiorari, the respondent believes the following section from the Nebraska State Constitution must also be considered in the Petition for Writ of Certiorari:

Article I, Section 11.

> **"Rights of the accused.** In all criminal prosecutions, the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

STATEMENT OF THE CASE

On August 30, 1991, four young men were together at the Tommy Rose Garden Apartments in Omaha, Douglas County, Nebraska. These four young men were Roy T. Hughes (hereinafter referred to as the respondent), Nolan Berry, Michael Floyd and Deandre Smith. At some point in the early morning hours of that day, these four individuals were confronted by a fifth man, who, at the time, was wielding a shotgun. This individual turned out to be Forrest Pointer. Forrest Pointer acted in a threatening manner towards the four young men.

The four boys were able to get away from Mr. Pointer. At some point thereafter, Roy Hughes attempted to scare Mr. Pointer away from the Tommy Rose Garden Apartments by firing a pistol over Mr. Pointer's head, but in that general direction. Following this, Mr. Pointer did, in fact, leave the area in his vehicle.

Some time later, Forrest Pointer was found dead from a contact-type gunshot wound. Omaha Police began an investigation, and, although they had other suspects, once they found out about the confrontation at the Tommy Rose Garden Apartments, they appeared to focus in on the four individuals who had been in the confrontation with the deceased, Mr. Pointer.

Two of these individuals, Nolan Berry (the declarant with regard to the issue before this Court) and Michael Floyd gave a variety of inconsistent statements. Mr. Floyd at one time claimed that the respondent, Roy Hughes, committed the murder, but later recanted his testimony. After he, himself, was charged with this particular murder, he again went back to his story concerning Roy Hughes' involvement.

Nolan Berry, the declarant herein, was questioned numerous times. It appears as though there were four, or possibly five, contacts wherein he made statements about Roy Hughes' involvement, or lack thereof. Two of these statements were at the police station and were tape-recorded. A third one was given in the office of counsel for Mr. Hughes, and was taken down by a certified court reporter. Mr. Berry's first tape-recorded statement (which was different than his initial statement to police) did implicate Mr. Hughes. Later, however, his second tape-

recorded statement, and the statement given before the court reporter, specifically recanted as to the involvement of Mr. Hughes. Mr. Berry stated that he had lied about Roy Hughes because of threats by law enforcement officers.

The one statement which Nolan Berry gave that did appear to inculpate Roy Hughes was given under extremely adverse conditions. Mr. Berry was picked up and taken, in custody, to the police station. It was late at night, and he was questioned at length prior to the tape-recorded statement being taken. The officers admitted having told Mr. Berry that they believed he was involved, and threatened to say that he was "the shooter" if he did not name one of the other individuals whom he had been with on the night Mr. Pointer was killed. Furthermore, at this time, Mr. Berry was an 18-year-old individual, lacking any substantial education or understanding of what was going on. He was by himself, and did not have the advice of a parent, lawyer, or any other adult. Furthermore, even the statement which was given under these substantially adverse conditions consisted primarily of Mr. Berry appearing to assent to leading questions.

At the trial of this matter, the government sought to introduce the tape-recording of Nolan Berry, wherein Mr. Berry had implicated Roy Hughes. The prosecution asked the court to declare Nolan Berry an unavailable witness because he had availed himself of his Fifth Amendment privilege against self-incrimination. The court did declare Mr. Berry to be unavailable on that basis, and allowed his statement into evidence as an exception to the hearsay rule.

The specific hearsay exception used was one where an unavailable declarant has made a statement so against his own penal or civil interest as to subject him to liability. This decision was made over a strenuous objection from the defense, which did not believe that the government had established that Mr. Berry was unavailable, and certainly had not established that Mr. Berry's statement was against any type of penal or civil interest that he might have.

The court, at trial, did admit both of the tape-recorded statements which Mr. Berry made at the Omaha Police Department, as well as the transcribed statement Mr. Berry gave. The initial tape-recorded statement was offered by the prosecution, and was again received over strong and timely objection by the defense. It was only after this inculpatory tape-recording was received into evidence that the defense sought, and received, a ruling allowing them to play the recantation statements.

At the trial of this matter, three of the four individuals who had been confronted by Forrest Pointer at the Tommy Rose Garden Apartments did testify. Michael Floyd testified, in substance, that Roy Hughes had committed the crime. Deandre Smith and Roy Hughes testified that the four of them had looked for Mr. Pointer but had not found him, and that Roy Hughes had *not* been involved in the crime. As noted above, the taped and transcribed statements of Nolan Berry were also introduced.

Ultimately, the jury returned verdicts of guilty with regard to Mr. Hughes as to the crimes of first-degree murder and use of a firearm to commit a felony. A timely

appeal was taken to the Nebraska Supreme Court, which was presented with numerous assignments of error by the defense. The court, having found reversible error as to the issues setout herein, declined to comment on the other assignments of error. The case was reversed and remanded for new trial.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NEBRASKA SUPREME COURT, REGARDLESS OF THE UNITED STATES CONSTITUTIONAL IMPLICATIONS, WAS ALSO DECIDED ON ADEQUATE INDEPENDENT STATE GROUNDS.

The Nebraska Supreme Court, in making a decision in this case, very clearly relied on not only the Confrontation Clause found in the Sixth Amendment to the United States Constitution, but also expressly relied upon the confrontation rights found in Article I, Section 11 of the Nebraska State Constitution. Article I, Section 11 of the Nebraska State Constitution states:

> "**Rights of the accused.** In all criminal prosecutions, the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

It is a well-settled principle of law that states are free to afford, through their own state constitutions, even greater protection than that which might be mandated under the federal constitution. Accordingly, in the case at Bar, even if the United States Supreme Court was to determine that the provisions of the Confrontation Clause found in the Sixth Amendment to the United States Constitution were not violated here, nonetheless, the highest court in the State of Nebraska would be entitled to reverse the case based upon the Confrontation Clause of the state constitution.

Under this circumstance, it is clear that the decision of the State Supreme Court is fully and completely supported by independent adequate state grounds. Under the principles espoused in the case of *Michigan v. Long*, 463 U.S. 1032 (1983), this Court generally does not involve itself in reviewing decisions which are adequately grounded in state law. See also, *Herb v. Pitcairn*, 324 U.S. 117 (1945).

II.

THE DECISION OF THE NEBRASKA STATE SUPREME COURT IS BASED UPON THE FACTS OF THAT PARTICULAR CASE, AND THESE FACTS ARE SUCH THAT THE CASE DOES NOT PRESENT ITSELF AS AN APPROPRIATE VEHICLE TO REACH THE QUESTIONS WHICH PETITIONER CLAIMS ARE IMPLICATED HEREIN.

The Petition for Writ of Certiorari filed by the petitioner appears to primarily rely upon two grounds for asking this Court to grant the writ. First, the petitioner claims that the issues are substantially similar to those in

the case of *Williamson v. United States*, Case No. 93-5256, wherein the court has already granted a writ of certiorari. Secondly, the petitioner claims that there is an ambiguity in the decisions of the United States Supreme Court with regard to the issues that petitioner seeks to raise in this case.

Because of the facts of this particular case, it is respondent's belief that it is neither similar to *Williamson v. United States*, nor is it an appropriate vehicle to reach the Confrontation Clause questions which the petitioner claims to want the Court to review.

In its decision, the Nebraska State Supreme Court was confronted with a number of issues raised by the respondent. In getting to the Confrontation Clause issue, the court stated:

> "For purposes of our analysis, we assume, first, that the declarant was unavailable to testify because he invoked his Fifth Amendment right of self-incrimination, and second, that the statement was against his penal interest because it tended to subject him to criminal liability."

It is of key importance that the court made it clear they were assuming those two things only for the purpose of reaching the analysis. The respondent had raised substantial challenges to both questions. The court did not say that they found, as a matter of fact, that those conditions were present; merely that they would assume them for purposes of their analysis. It appears obvious, therefore, that had the court found no violation of the respondent's Confrontation Clause rights, they would have then worked backwards to see if, in fact, those presumptions were true.

In fact, this case probably did not require the court to reach the Confrontation Clause issue in order to reverse the conviction. That is because the two assumptions, when carefully examined, do not hold up.

The declarant, Nolan Berry, was probably mischaracterized when he was determined to be an unavailable witness. While it is true that Mr. Berry did claim the Fifth Amendment, there was a belief by the defense that his unavailability *may* have been caused by the prosecution. The respondent asked for a hearing on this matter (which he is entitled to under the decision of *State v. Wiley*, 223 Neb. 835 (1986), and it was granted by the court. Nonetheless, the court entirely cutoff respondent's inquiry at the hearing, and accordingly, under Nebraska State law, there would have been insufficient facts to declare the witness unavailable.

Also, there is substantial doubt whether the statement by Nolan Berry could even be considered a statement against his penal interests. This, even more than the assumption above, is fully supported by the decision of the Nebraska State Supreme Court itself.

The record, and decision of the State Supreme Court, make it clear that Nolan Berry actually had a lot to *gain* from the statement he gave which inculpated Roy Hughes. He was told that he would be blamed for the shooting if he did not name someone, and accordingly, pinning this on Mr. Hughes was a way out for him. Beyond that, a review of the Berry statement in question shows that there is virtually nothing about it which could have, in any fashion, been used against Mr. Berry in a criminal law context.

Even if the Supreme Court made proper assumptions about the hearsay exception, and even if the issue had to be decided on Confrontation Clause issues, nonetheless, there would be no reason to grant certiorari in this case. With regard to the issues that are fairly raised by the facts of this case, there is well-established and well-settled precedent of this Court which justifies the State Supreme Court's decision. These precedents are clear, unambiguous, and have no basis which would justify a review at this time.

The following cases were cited by the State Supreme Court, among others, as being precedents from this Court which support the decision herein. *Lee v. Illinois*, 476 U.S. 530 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *White v. Illinois*, ___ U.S. ___, 112 S.Ct. 736 (1962); *Chambers v. Mississippi*, 410 U.S. 284 (1973). See also the Eighth Circuit case of *United States v. Rasmussen*, 790 F.2d 55 (8th Cir. 1981); and the prior State of Nebraska Supreme Court case of *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986).

Because the case decided by the Nebraska Supreme Court was grounded in clear, unambiguous precedent from this United States Supreme Court, and also because the case does not contain an appropriate fact-pattern to reach the questions this Court has already agreed to review, therefore, it is respondent's belief that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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